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Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

PAUL KELLOGG,

Petitioner,

-against-

WAYNE STRACK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

PAUL KELLOGG
Pro Se Petitioner
360 East 72nd Street
New York, New York 10021
(212) 535-2042

3988

QUESTION PRESENTED

Whether the Court of Appeals erred in denying the petitioner's motion for rehearing on the denial of the petitioner's Rule 60(b) motion.

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PRELIMINARY STATEMENT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered in this case on November 13, 2001.

OPINIONS BELOW

The opinions of the United States District Court, Southern District of New York and the United States Court of Appeals for the Second Circuit appear in the Appendix to this petition, submitted herewith.

JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 13, 2001. No application has been filed for an extension of time within which to file this petition. The Court's jurisdiction is invoked under Title 28, United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. AMEND. XIV

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner was convicted of assault in the second degree (N.Y. Penal Law 120.05 [2]) and criminal possession of a weapon in the third degree (N.Y. Penal Law 265.02 [1]) following a jury trial in the Supreme Court of the State of New York, County of New York. The charges arose out of an incident that occurred at the Paul Stuart clothing store in New York City on December 29, 1992. During that incident, the prosecution alleged that in the course of an altercation, the petitioner had swung an umbrella at a store security guard, knocking him to the ground and injuring him. In defense of these charges, the petitioner testified that the security guard had raised his arms in a menacing manner and that the petitioner had only swung his umbrella in self-defense, not to intentionally injure anyone.

On August 25, 1994, the petitioner was sentenced, in absentia, to concurrent indeterminate terms of imprisonment of two and one-third to seven years. In January, 1995, the petitioner was returned on the bench warrant that had been issued by the sentencing court. On January 11, 1995, the previously imposed sentence was ordered to be executed in the petitioner's absence.

The petitioner appealed his judgment of conviction to the Supreme Court of the State of New York, Appellate Division, First Department. On appeal, he argued that he had been deprived of his right to a fair trial by the trial judge's rulings which allowed the introduction of evidence of uncharged criminal acts that were attributed to the petitioner and the cross-examination of the petitioner by the prosecutor regarding his prior criminal convictions. The Appellate Division, First Department, affirmed the petitioner's conviction and the New York Court of Appeals, the highest state court, denied his application for permission to appeal.

On March 22, 1996, the petitioner filed a petition for a writ of habeas corpus with the United States District Court, Southern District of New York. In support of this application, he raised the same claims that he had raised in his state court appeal. On July 10, 1997, United States Magistrate Judge Douglas Eaton issued a Report and Recommendation recommending that the petitioner's application for habeas corpus relief be denied, and in a Memorandum, Opinion and Order dated October 14, 1997, United States District Judge Denise Cote adopted the magistrate's recommendation and denied the petitioner's habeas petition. On March 5, 1998, the petitioner filed a notice of appeal from the District Court's decision and on April 30, 1998, the United States Court of Appeals for the Second Circuit dismissed the petitioner's appeal as untimely.

On January 5, 2000, the United States District Court, Southern District of New York received a letter from the petitioner. In this letter, the petitioner sought permission to move for reconsideration of its decision of October 14,

1997 or, in the alternative, for permission to appeal from that decision. Treating the petitioner's application as a motion pursuant to Rule 60(b), Fed. R. Civ. P., the District Court ordered the petitioner to file an amended submission so that he could set forth his reasons for not submitting his application sooner. Though the petitioner complied with this order, the District Court nevertheless denied his motion in a Memorandum, Opinion and Order dated May 5, 2000.

The petitioner, acting pro se, then sought a certificate of probable cause from the United States Court of Appeals for the Second Circuit. Treating the petitioner's motion as a motion for a certificate of appealability, the United States Court of Appeals for the Second Circuit denied his application in a decision dated October 9, 2001. Thereafter, the petitioner filed a petition for a panel rehearing. In an Order dated November 13, 2001, the United States Court of Appeals for the Second Circuit denied his application.

REASONS FOR GRANTING THE WRIT

THE LOWER COURTS MISAPPLIED THE APPROPRIATE STANDARD FOR DETERMINING THE PETITIONER'S MOTION FOR RECONSIDERATION OF THEIR PRIOR DECISIONS WHICH DENIED THE PETITIONER'S APPLICATION FOR HABEAS CORPUS RELIEF. THE JUDGMENT OF THE U.S. COURT OF APPEALS SHOULD THEREFORE BE REVERSED.

In his attempts to overturn a state court conviction which was the product of improperly admitted evidence, the petitioner, acting pro se, sought reconsideration of the

District Court's decision which had denied his petition for a writ of habeas corpus. Treating the petitioner's application as a motion pursuant to Rule 60(b) of the Fed. R. Civ. P., the District Court noted the proper standard for determining such motions in its decision of May 5, 2000. However, in deciding that the petitioner's motion should be denied, the District Court failed to apply Rule 60(b) properly and thereby deprived the petitioner of his right to due process of law. The judgment of the United States Court of Appeals for the Second Circuit which affirmed the District Court's decision was likewise erroneous and should therefore be overturned.

Rule 60(b) provides, in pertinent part, that a district court can relieve a party from a final judgment by reason of:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

The finality of judgments is, of course, one of the highest interests which our jurisprudential system seeks to promote. *United States v. Cirami*, 563 F.2d 26, 33 (2d Cir. 1977). Thus, "[n]ormally, the dismissal of an action for

failure to prosecute is a matter within the discretion of the district court judge". *Vindigni v. Meyers*, 441 F.2d 377, 377 (2d Cir. 1971), *citing Fischer v. Dover Steamship Co., Inc.* 218 F.2D 682 (2d Cir. 1955). However, when deciding a motion under Rule 60(b), "a court must balance the policy in favor of hearing a litigant's claims on the merits against the policy in favor of finality". *Kotlicky v. U.S. Fidelity & Guar. Co.*, 817 F.2d 6, 9 (2d Cir. 1987), *citing* 11 C. Wright & A. Miller, *Federal Practice and Procedure*, Sect. 2857 (1973).

Clause (6) in Rule 60(b) has been described as "a grant reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses", 7 *Moore's Federal Practice*, 60.27 [2], at 375 (2d ed. 1975), and should, in a proper case, be "liberally applied". *Id.* at 352. Generally, relief under Rule 60(b)(6) is appropriate where it is shown that there are "extraordinary circumstances", *Ackerman v. United States*, 340 U.S. 193, 199 (1950), or where denial of the motion would result in a situation of "extreme hardship". *United States v. Karahalias*, 205 F.2d 331, 333 (2d Cir. 1953). Some courts have held that three conditions must be met in order to warrant the granting of such a motion: the evidence in support of the motion must be highly convincing, *United States v. Cirami*, 563 F.2d at 33; that the movant establish good cause for failing to act sooner, *Kontoulas v. A.H. Robins Co.*, 745 F.2d 312, 316 (4th Cir. 1984), and that no undue hardship be caused to any other parties to the action. *Kotlicky v. U.S. Fidelity & Guar. Co.*, 817 F.2d at 9. Judged by any of these standards, it is clear the

petitioner's motion warranted vacatur of the judgment and that the lower court's denial of his motion was erroneous.

As the petitioner noted in his amended submission, as the District Court acknowledged in its decision of May 5, 2001, the conditions of the petitioner's incarceration made it completely impossible for him to submit his motion at an earlier time. For one thing, his access to the law library was severely restricted, as was his access to typewriters and copy machines. As a result, he was continually thwarted in his efforts to assemble and prepare his motion throughout the term of his imprisonment. Moreover, the facility's restriction of his phone privileges, coupled with the censoring of his mail, exacerbated his predicament, and made it virtually impossible for him to complete his motion until after his release from custody. Under the circumstances, there was certainly good cause for the petitioner's failure to submit his motion sooner than he did.

It is of great significance to note that there would have been no prejudice to the respondent if the petitioner's motion were granted. Since the petitioner's application raised purely legal issues which could be decided either on written submissions or oral argument, the respondent could not contend that he would suffer any adverse consequences if the District Court were to consider the merits of the petitioner's claims. Indeed, in opposing the petitioner's motion, the respondent never asserted that he would be prejudiced in any way if the District Court were to grant the relief sought by the petitioner. And in its decision denying the petitioner's motion, the District Court did not even suggest that the

respondent would suffer any harm if the merits of the petitioner's application were considered. Thus, it is clear that the petitioner easily satisfied the requirement that judicial review of his claims would not cause any undue hardship to any other party to the action. *Kotlicky v. U.S. Fidelity & Guar. Co., supra.*

Finally, a review of the petitioner's motion demonstrates that he presented "highly convincing material" to support the vacatur of his state conviction. *United States v. Cirami,* 563 F.2d at 33. His claim that he was not brought before the court that imposed his sentence, and that he was deprived of an opportunity to be heard by that court, raised serious concerns that he was denied his due process right to be present at a material stage of the proceedings against him. *Chapman v. United States,* 553 F.2d 886 (2d Cir. 1977). Considering the gravity of the claimed violation, the logistical difficulties that befell the petitioner during his incarceration, the complete absence of prejudice to the respondent, it is submitted that the denial of the petitioner's motion constituted a severe and improper determination of the petitioner's application. *Foley v. United States,* 645 F.2d 155, 157 (2d Cir. 1981).

In sum, the District Court abused its discretion when it denied the petitioner's motion under Rule 60(b)(6), Fed. R. Civ. P. and the Court of Appeals for the Second Circuit erred in its decision upholding the lower court's decision. Under the circumstances, certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

(Submitted: November 8, 2000
Decided: OCT 9 2001)

Docket No. 00-2325

PAUL KELLOGG,

Petitioner-Appellant,

–v.–

WAYNE STRACK,

Respondent-Appellee.

Before:

STRAUB, SOTOMAYOR, *Circuit Judges,*
SPATT, *District Judge.**

Petitioner Paul Kellogg moves for a certificate of probable cause ("CPC") in his appeal from a judgment of the United States District Court for the Southern District of New York (Denise Cote, *Judge*) denying his Fed. R. Civ. P. 60(b) motion for relief from a judgment dismissing his 28 U.S.C. § 2254 petition. For the reasons stated herein, we construe Kellogg's motion for a CPC as a motion for a

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* The Honorable Arthur D. Spatt, United States District Judge for the Eastern District of New York, sitting by designation.

certificate of appealability, deny the motion, and dismiss the appeal.

Affirmed.

PAUL KELLOGG, *pro se*, New York, NY, *for petitioner-appellant*.

PATRICK J. WALSH, New York, NY, *for respondent-appellee*.

PER CURIAM:

Paul Kellogg, *pro se*, moves for a certificate of probable cause ("CPC"), which we construe as a motion for a certificate of appealability ("COA"), permitting him to appeal an order entered by the United States District Court for the Southern District of New York, (Denise Cote, *Judge*). The order denied Kellogg's Fed. R. Civ. P. 60(b) motion for relief from the District Court's prior judgment denying his 28 U.S.C. § 2254 petition. This opinion considers whether a COA is required to appeal a district court's denial of a Rule 60(b) motion for relief from judgment when the underlying judgment is a denial of a § 2254 petition. We conclude that a COA is required and decline to issue a COA for Kellogg's appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In March of 1996, prior to the passage of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996), Kellogg filed a

28 U.S.C. § 2254 petition for habeas corpus relief, challenging a New York State conviction for assault and criminal possession of a weapon. The District Court referred the petition to a magistrate judge, who filed a report and recommendation that the petition be denied. The District Court adopted the recommendation and entered a judgment denying the petition in October 1997 ("1997 judgment"). Kellogg appealed the judgment six months later, and we dismissed the appeal as untimely.

In January 2000, twenty-six months after the entry of the 1997 judgment denying the petition, Kellogg moved pursuant to Fed. R. Civ. P. 60(b) for relief from the judgment.[1] The District Court denied the motion on the grounds that Kellogg had not filed the motion within a reasonable time and had not shown good cause which would excuse the delay in filing. In the order denying the motion, the District Court declined to issue a COA. Kellogg now moves this Court for a certificate of probable cause ("CPC") to permit him to appeal the District Court's denial of his Rule 60(b) motion.

DISCUSSION

We construe Kellogg's motion for a CPC as a motion for a COA. The Supreme Court has recently held that the provisions of AEDPA governing the issuance of a COA apply to all appeals filed subsequent to the passage of

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[1] Kellogg moved the District Court for "leave to file the within notice for reconsideration" of the judgment, which the District Court construed as a Rule 60(b) motion for relief from a final judgment.

AEDPA, regardless of whether the underlying petition was filed before the passage of the Act. *See Slack v. McDaniel*, 529 U.S. 473, 481-82 (2000). Accordingly, the pre-AEDPA CPC requirement is an anachronism and inapplicable to Kellogg's appeal.

Generally, a petitioner's right to appeal an order denying habeas relief is governed by 28 U.S.C. § 2253(c), which provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from (A) the final order in a habeas corpus proceeding. . . . " 28 U.S.C. § 2253(c)(1). The question presented by Kellogg's motion is whether a district court's denial of a Fed. R. Civ. P. 60(b) motion for relief from a judgment denying a § 2254 petition is governed by this provision, thereby requiring that a COA be issued before the appeal may go forward.[2]

To begin with, the plain text of § 2253(c)(1) would seem to make the COA requirement applicable here. There is no question that the denial of a Rule 60(b) motion in non-habeas cases is a "final order" for purposes of appeal, *see Stone v. INS*, 514 U.S. 386, 401 (1995), and absent indications to the contrary, we would expect Congress to have intended the same meaning when using the term "final order" in crafting AEDPA, *see, e.g., Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 147 (2d Cir. 1999).

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[2] This Court has recently settled the question of whether a Rule 60(b) motion for relief from the denial of a § 2254 petition should be treated as a second or successive habeas petition. *See Rodriguez v. Mitchell*, 252 F.3d 191, 198-200 (2d Cir.2001) (holding that such a motion should not be treated as a second or successive petition).

Not only is there no such contrary indication, but it would be rather anomalous for Congress to have intended to screen out unmeritorious appeals from denials of habeas corpus petitions and yet not have wished to apply this same screen to 60(b) motions seeking to revisit those denials.

This Court has previously taken an expansive view towards the applicability of the CPC/COA requirement to orders other than an order denying a habeas petition. *See Grune v. Coughlin*, 913 F.2d 41, 44 (2d Cir. 1990) (holding that a CPC is required when a petitioner appeals the denial of a bail application pending the outcome of a habeas proceeding). We reasoned in *Grune* that "[t]he interest served by the certificate of probable cause requirement – relieving the state and the court system of the burdens resulting from the litigation of insubstantial appeals – is equally served whether the order appealed is a final disposition of the merits or a collateral order." *Id.* at 44. This reasoning is equally applicable to appeals arising from orders denying post-judgment relief. Accordingly, in at least one prior case we assumed without discussion that a COA was required to appeal a 60(b) motion requesting reconsideration of a denied § 2255 petition.[3] *See Mickens v. United States*, 148 F.3d 145, 146 (2d Cir. 1998).[4] Moreover, all of our sister Circuits to have

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[3] As we explained in *Fama v. Commissioner of Correctional Services*, 235 F.3d 804, 815-16 (2d Cir. 2000), "[s]ections 2254 and 2255 are generally seen as *in pari materia*" and therefore "the reasoning of [cases] in the context of § 2255 petitions applies equally to § 2254 petitions."

[4] While *Rodriguez* initially appeared to suggest that a COA was not ordinarily required to appeal the denial of a Rule 60(b)

considered this issue in either the § 2254 or § 2255 context have concluded that a COA is required before the denial of 60(b) motion may be appealed. *See, e.g., Morris v. Horn,* 187 F.3d 333, 339 (3d Cir. 1999); *Langford v. Day,* 134 F.3d 1381, 1382 (9th Cir. 1998); *Rutledge v. United States,* 230 F.3d 1041, 1047 (7th Cir. 2000), *cert. denied,* ___ U.S. ___, 121 S.Ct. 1207 (2001) (assuming without discussion that a COA is necessary to appeal the denial of a Rule 60(b) motion in a habeas case); *Zeitvogel v. Bowersox,* 103 F.3d 56, 57 (8th Cir.), *cert. denied,* 519 U.S. 1036 (1996) (same).

We thus expressly hold that the COA requirement provided in 28 U.S.C. § 2253(c) applies to an order denying a Rule 60(b) motion for relief from a judgment denying a § 2254 petition. Kellogg is therefore required to obtain a COA to go forward with his appeal. We now address the merits of his motion for a COA.

In order to obtain a COA, the petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard is designed to permit an appeal to go forward only if the appeal has a threshold quantum of merit. In the context of a denial of a Rule 60(b) motion, a substantial showing that the district court abused its discretion indicates that the appeal has the threshold quantum of merit to go forward. *See Transaero, Inc. v. La Fuerza Aerea Boliviana,* 162 F.3d 724, 729 (2d Cir. 1998), *cert. denied,* 526 U.S. 1146 (1999) (holding that the standard of review of a district court order granting or denying a Rule 60(b) motion is whether the order

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motion; *see* 252 F.3d at 200 n.3, on September 7, 2001 the opinion was amended, eliminating any such implication. *See* Order, *Rodriguez v. Mitchell,* No. 99-2170 (September 7, 2001).

constituted an abuse of discretion). Accordingly, we hold, following the Supreme Court's formulation in *Slack*, 529 U.S. at 484, that a COA should issue only if the petitioner shows that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion, and (2) jurists of reason would find it debatable whether the underlying habeas petition, in light of the grounds alleged to support the 60(b) motion, states a valid claim of the denial of a constitutional right. *See also Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (holding that a CPC should issue only if petitioner makes a substantial showing that the district court has abused its discretion by denying the Rule 60(b) motion); *Lindsey v. Thigpen*, 875 F.2d 1509, 1512 (11th Cir. 1989) (same).

Kellogg has failed to demonstrate that a reasoned jurist would find debatable whether the District Court abused its discretion. A Rule 60(b) motion must be made within one year or within a "reasonable time." Fed. R. Civ. P. 60(b). Kellogg's motion was made twenty-six months after the entry of the final judgment, a period of time which constitutes a patently unreasonable delay absent mitigating circumstances. *See, e.g., Truskoski v. ESPN, Inc.*, 60 F.3d 74, 77 (2d Cir. 1995) (Rule 60(b) motion made eighteen months after judgment was not made within a reasonable time). Kellogg's bare assertions that the conditions of his confinement prevented him from filing his motion earlier are insufficient to excuse the delay. *See Jones v. Phipps*, 39 F.3d 158, 163-64 (7th Cir. 1994) (enduring ordinary hardships of incarceration does not excuse failure to respond within a reasonable time).

As Kellogg has failed to make a showing that the District Court abused its discretion by declining to grant relief from its prior judgment denying his § 2254 petition, a COA shall not issue. Accordingly, Kellogg's motion for a COA is denied and the appeal is dismissed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAUL KELLOGG, Petitioner -v- WAYNE STRACK, Warden, Fishkill Correctional Facility, Respondent.	96 CIV. 2114 (DLC) **MEMORANDUM OPINION & ORDER**

APPEARANCES

For petitioner:

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For respondent:

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DENISE COTE, District Judge:

Petitioner *pro se* Paul Kellogg ("Kellogg") moves pursuant to Rule 60(b), Fed. R. Civ. P., for reconsideration of this Court's October 14, 1997 decision dismissing Kellogg's petition: or a writ of habeas corpus. For the reasons stated, Kellogg's motion is denied.

BACKGROUND

The charges against Kellogg related to a December 1992 incident in which Kellogg, having created a disturbance in a clothing store, assaulted security guards who were escorting him out of the store. Kellogg was convicted on assault and weapons charges in the Supreme Court of New York on August 25, 1994.

Kellogg absconded following his trial and was sentenced *in absentia* to a prison term of two and one-third to seven years on August 25, 1994. He was arrested on a bench warrant approximately six months later, and began serving his sentence on February 1, 1995. Kellogg was released in September 1999, and is now under parole supervision.

After pursuing state court review, Kellogg, represented by counsel, filed a petition for a writ of habeas corpus with this Court on March 22, 1996. In his petition, Kellogg argued that the state trial court had improperly admitted evidence of his prior misconduct and prior convictions. On October 14, 1997, the Court issued a Memorandum Opinion and Order adopting, over Kellogg's objections, the Report and Recommendation of Magistrate Judge Eaton and denying the petition. Kellogg filed a notice of appeal on March 5, 1998. On April 30, 1998, the Court of Appeals for the Second Circuit dismissed Kellogg's appeal as untimely.

On January 5, 2000, this Court received a letter from Kellogg requesting "leave to file the within notice for reconsideration" or "to appeal the judgment in this action entered on October 24, 1997." For the reasons explained

in its January 26, 2000, Order, the Court construed Kellogg's request as a motion under rule 60(b), Fed. R. Civ. P., and ordered that Kellogg make an amended submission by February 24, 2000, stating his reasons for failing to have made his application sooner. Kellogg submitted an amended application on February 22, 2000, to which the Court ordered that respondent respond.

In the instant motion, Kellogg argues that his rights were violated because he was not given an opportunity to appear in state court and be heard on January 9 and 11, 1995, before beginning to serve his sentence, having been arrested following his flight after trial.[1]

DISCUSSION

Because Kellogg's request for reconsideration was filed more than ten days after the entry of the judgment to which it relates, the Court construes it as a motion under Rule 60(b). *See Kotlicky v. United States Fidelity & Guaranty Company*, 817 F.2d 6, 8 (2d Cir. 1987) (treating motion to vacate under Fed. R. Civ. P. 59 as Rule 60(b) motion).

Rule 60(b) provides for relief from judgment for reasons of:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in

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[1] Although not clear from Kellogg's original Rule 60(b) application, Kellogg makes clear in his reply memorandum that his claims concern his absence from court in January 1995, not his absence from the August 1994 sentencing.

> time to move for a new trial under Rule 59(b); (3) fraud, . . . , misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Rule 60(b), Fed. R. Civ. P. Any motion under Rule 60(b) must be made within a "reasonable time"; a motion made under Rule 60(b)(1), (2) or (3) must be made within one year of the entry of judgment. *Id.*

For a Rule 60(b) motion to prevail, a three-part test must be met. First, there must be "highly convincing" evidence supporting the motion. Second, the moving party must show good cause for failing to act sooner. Third, the moving party must show that granting the motion will not impose an undue hardship on the other party. *See Kotlicky*, 817 F.2d at 9. In addition, a motion cannot be filed under Rule 60(b)(6) if it could have been filed under rule 60(b)(1), (2) or (3) but for the one-year time limit. *See United States v. Cirami*, 563 F.2d 26, 32 (2d Cir. 1977).

Kellogg has failed to demonstrate good cause for his failure to make his Rule 60(b) motion sooner. In his amended application, Kellogg states that he was unable to make a timely motion because of the conditions of his incarceration. Kellogg states principally that his access to the prison law library and to typewriters and copiers was limited and infrequent. Simply stated, these facts do not

convince the Court that Kellogg was unable to file his motion, when scores of prisoners facing the same conditions prepare and file papers with this Court every year. Moreover, those conditions did not prevent Kellogg from making a timely request for an extension of time, a request that is routinely granted by courts to prisoners.

Even if the Court were to deem Kellogg's motion timely, Kellogg could not prevail. Kellogg's argument relating his right to appear in state court on January 9 and 11, 1995, is before this Court for the first time on this motion; it was not raised in Kellogg's petition for habeas corpus relief. Consequently, it does not provide a basis for granting Kellogg's motion under Rule 60(b), which may only be directed to the prior judgment entered by this Court. Because this argument was not before the Court when it considered Kellogg's petition, it does not provide a basis for relief from the Court's October 14, 1997 decision.

CONCLUSION

For the reasons stated, Kellogg's motion under Rule 60(b), Fed. R. Civ. P., is denied. No certificate of appealability shall issue. Should the petitioner seek to appeal in forma pauperis, I find, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438 (1962).

SO ORDERED:

Dated: New York, New York
May 5, 2000

/s/ Denise Cote
DENISE COTE
United States District Judge

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
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ROSEANN B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse, Foley Square, in the City of New York, on the thirteenth day of November two thousand one.

Present:

Hon. Chester J. Straub.
Hon. Sonia Sotomayor,
Hon. Arthur D. Spatt,*

PAUL KELLOGG,

Petitioner-Appellant,

V.

WAYNE STRACK,

Respondent-Appellee.

Docket No. 00-2325

(Filed Nov. 13, 2001)

A petition for panel rehearing having been filed herein by Paul Kellogg, pro se,

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* The Honorable Arthur D. Spatt, United States District Judge for the Eastern District of New York, sitting by designation.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By: /s/ Art Heller
Art Heller,
Administrative Attorney

(2)
Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

PAUL KELLOGG,

Petitioner,

-against-

WAYNE STRACK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL APPENDIX

PAUL KELLOGG
Pro Se Petitioner
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6pp

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAUL KELLOGG, Plaintiff, -v- WAYNE STRACK, Warden, Fishkill Correctional Facility, Defendant.	96 CIV. 2118 (DLC) **MEMORANDUM OPINION AND ORDER**

DENISE COTE, District Judge:

In October 1993, Paul Kellogg ("Kellogg") was convicted following trial of second degree assault and third degree criminal possession of a weapon. Kellogg was sentenced to two 1/3 to seven years in prison on each count, to be served concurrently. The Appellate Division reviewed the merits and issued an opinion affirming the conviction on December 19, 1995. On February 12, 1996, the New York Court of Appeals denied leave to appeal. On March 22, 1996, Kellogg filed a petition for a writ of habeas corpus on the grounds that the Court had improperly admitted evidence of prior misconduct and two prior convictions. Magistrate Judge Douglas Eaton issued an Report and Recommendation on July 10, 1997 ("Report"), that recommended that the petition be denied. Petitioner's counsel filed timely objections to the Report. For the following reasons, the Report is adopted and Kellogg's petition for a writ of habeas corpus is denied.

Background

The evidence at trial established that Kellogg entered the retail store Paul Stuart in Manhattan on several occasions in late 1992, and once in the store cursed, spit and struck the walls. On December 15, 1992, Barry Goldstein, the director of security, told Kellogg that he was no longer allowed in the store and would be subject to arrest if he returned. On December 29, 1992, Kellogg appeared in the store again, speaking incoherently and cursing. Goldstein asked Kellogg to produce identification. Kellogg refused and began to walk out, but then spun around and began screaming, spitting and striking the floor with his umbrella. Security guards then led him out of the store, at which point Kellogg spat and cursed at Goldstein and swung his umbrella at Goldstein's head. The blow knocked Goldstein to the ground, his face covered with blood.

Kellogg took the stand in his own defense at trial to assert a defense of justification. He admitted swinging his umbrella at Goldstein but testified that he did so because Goldstein came at him with an angry expression and raised arms. Kellogg explained that he had not intended to strike anyone, but had acted only to keep the guards away from him and that Goldstein had walked into the path of the swinging umbrella.

The Report

Kellogg objects to the Report because, in his view, it did not adequately describe the trial testimony about the earlier incidents in December 1992 when Kellogg had

entered the store. According to the petitioner, an adequate summary would have shown that the prosecutor used the earlier incidents to demonstrate that Kellogg was mentally unstable, instead of for the purpose for which they were admitted by the court, that is, to shed light on his knowledge, motive and intent on the day of the crimes. Finally, Kellogg contends that the prosecutor intentionally elicited testimony from Kellogg about a prior conviction about which the Court had precluded examination.

The Standard

In reviewing the Report, I "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(c). Where, as here, a party has made a timely, specific written objection to portions of the Report, the district court is required to make a de novo determination regarding those parts of the Report. *Greene v. WCI Holdings Corp.*, 956 F. Supp. 509, 513 (S.D.N.Y. 1997). Kellogg's objections to the Report are timely because they were filed within ten days after his receipt of the Report. Fed. R. Civ. P. 72(b). His petition seeking a writ of habeas corpus was also timely filed under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which requires a person convicted of a crime in state court to file a petition of habeas corpus within one year after the conviction becomes final. 28 U.S.C.A. § 2244(d)(1)(A).

In considering a habeas petition based on evidentiary rulings of a trial court, the writ will issue only where a state court's evidentiary ruling deprived the petitioner of

a " 'fundamentally fair trial.' " *Rosario v. Kuhlman*, 839 F.2d 918, 925 (2d Cir. 1988) (citing *Taylor v. Curry*, 708 F.2d 891 (2d Cir.), *cert. denied*, 464 U.S. 1000 (1983)). Considering de novo those portions of the trial testimony to which Kellogg directs this Court's attention through his objections, I find that there was no error, constitutional or otherwise, in allowing the jury to hear such evidence. Indeed, without the evidence about Kellogg's course of conduct in the store in the month prior to the assault, the jury would have been without critical information to place the actions of all participants in the December 29 events in context. The jury would have also been without critical evidence from which to evaluate Kellogg's motive in re-entering the store on December 29 and in behaving as he did on that day, as well as to evaluate his understanding of the employees' actions and his intent in acting as he did as he swung the umbrella.

Turning to the second objection, there is no basis to conclude that the prosecutor inquired about a conviction on November 5, 1992, in order to elicit improperly testimony about an assault conviction that the court had ruled inadmissible. Defense counsel had already elicited on direct examination of Kellogg that the defendant had been convicted of criminal mischief. On cross examination the prosecutor referred to that testimony and asked the defendant to tell the jury again what the crime was. In response, the defendant volunteered that the conviction was for assault in the third degree, a conviction that the court had ruled could not be the subject of cross examination. There is no allegation that the prosecutor inaccurately described that date of the criminal mischief conviction in his question. Moreover, the question

directed the defendant's attention explicitly to the conviction he had already identified on direct examination. In light of all of these circumstances, and for the reasons also described in the Report, there was no error in denying the motion at trial for a mistrial.

Conclusion

For the foregoing reasons, Magistrate Judge Eaton's Report is adopted and the petition for a writ of habeas corpus is denied. No certificate of appealability shall issue. Should the petitioner seek to appeal in forma pauperis, I find, pursuant to 28 U.S.C. Section 1915(a)(3), that any appeal from this Order would not be taken in good faith. *See Coppedge v. United States,* 369 U.S. 438 (1962).

SO ORDERED:

Dated: New York, New York
October 14, 1997

/s/ Denise Cote
Denise Cote
United States District Judge